TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1075.

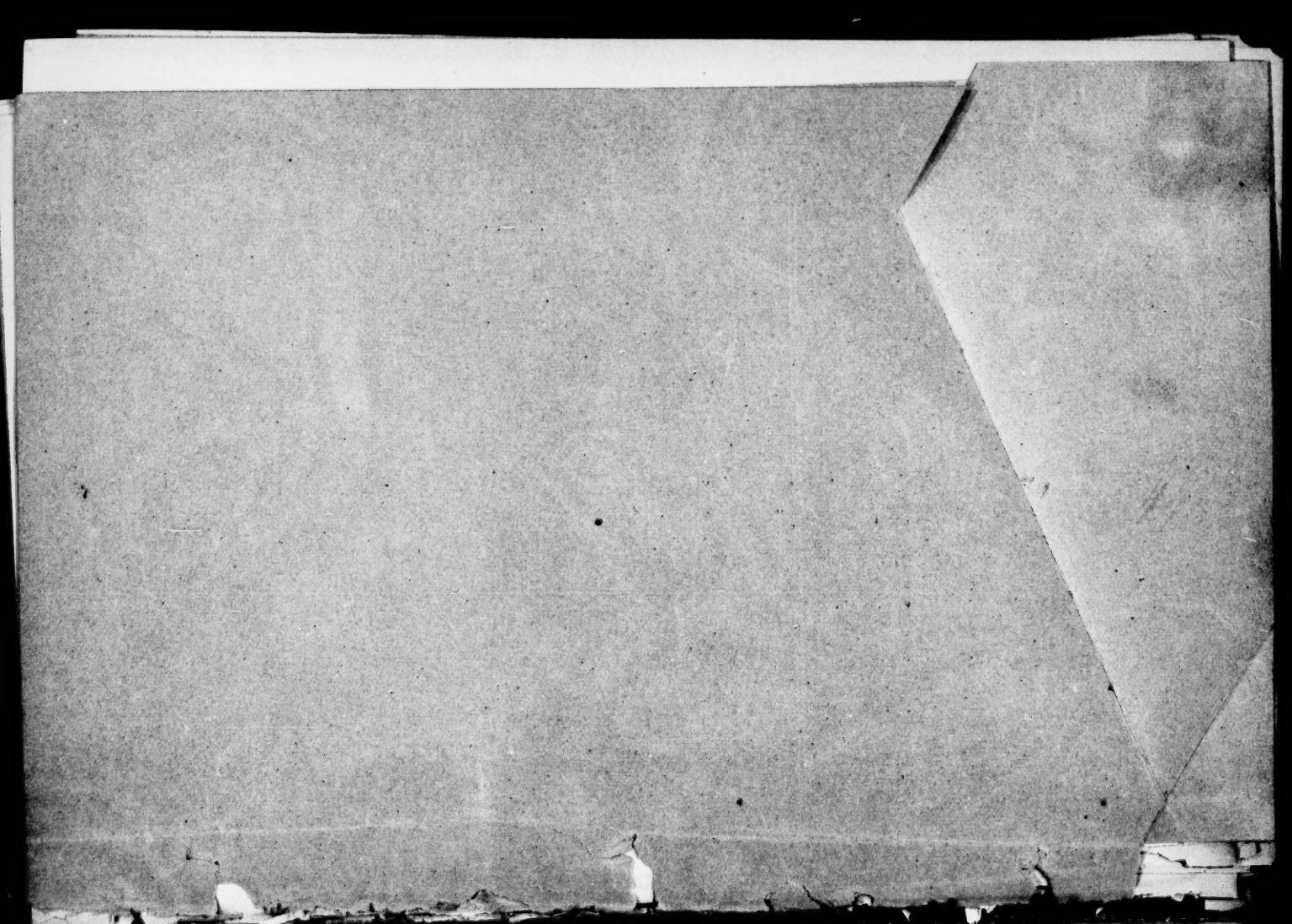
THE UNITED STATES, APPELLANT,

vs.

RICHARD W. TYLER.

APPEAL FROM THE COURT OF CLAIMS.

FILED OCTOBER 15, 1881.



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1 Court of Claims, December term, 1879.

RICHARD W. TYLER
vs.
THE UNITED STATES. } No. 12337.

I.—*Petition.*—*Filed May* 15, 1880.

To the honorable Court of Claims:

The petition of Richard W. Tyler, of Washington, District of Columbia. Your petitioner is an officer of the United States Army, on the retired list, and a citizen of the United States, residing in the city of Washington, in the District of Columbia. On the 26th day of December, 1861, your petitioner was duly enlisted in the 1st Regiment of United States Sharpshooters, in the military service of the United States, and promoted 1st sergeant March 23d, 1862; 2d lieutenant May 25th, 1864, and 1st lieutenant August 4th, 1864; resigned November 9th, 1864; appointed 2d lieutenant Veteran Reserve Corps October 25th, 1864; accepted November 10th, 1864; promoted 1st lieutenant and captain by brevet March 13th, 1865, for gallant and meritorious service during the war; mustered out October 15th, 1866.

Appointed 1st lieutenant 44th U. S. Infantry July 28th, 1866; accepted October 15th, 1866; promoted captain by brevet March 2d, 1867, for gallant and meritorious service at the battle of Deep Bottom, Virginia. On the 15th day of December, 1870, your petitioner
2 was placed on the list of officers of the Army retired from active service, with the rank of captain, in accordance with the acts of Congress approved August 3d, 1861, and July 28th, 1866, for loss of left arm from wound received in line of duty. Your petitioner was continuously in active service from December 26th, 1861, to December 15th, 1870; and has been continuously in service as a captain of the United States Army, on the retired list, ever since December 15th, 1870, making continuous service since December 26th, 1861. Your petitioner claims that officers of the United States Army on the retired list are, and have ever been, in the military service of the United States; and that in computing length of service for the service or longevity pay and allowances provided for officers of the Army for length of service, they are now, and have been since March 2d, 1867, entitled to include as such service a l the time they may have been borne on the said retired list of the Army, whether on duty or not. The defendants have withheld from your petitioner all pay and allowances for length of service, known as service or longevity pay, which have accrued to and become due him, except the service or longevity pay and allowances for his first term of five years' service; and your petitioner claims that he has been entitled to the service or longevity pay for his second term of five years' service since December 26th, 1871, and the service or longevity pay for his third term of five years' service since December 26th, 1876; and that the aggregate amount of such service pay wrongfully withheld from him by the said defendants is sixteen hundred and fifty dollars. There has been no action on this claim by Congress, nor any department of the government, except a demand on the pay department of the Army for the same, upon which payment was refused. There has been no transfer or assignment of this claim, or any part thereof, or interest therein; and your petitioner is the sole owner of the same, and is justly entitled, as he believes, to the sum of

sixteen hundred and fifty (1,650) dollars, which amount has already accrued, as hereinbefore indicated, and is due and unpaid.

3 Your petitioner has at all times borne true allegiance to the Government of the United States, and he has not at any time or in any way aided, abetted, or given encouragement to rebellion against the United States.

Your petitioner demands judgment against the United States for the sum of sixteen hundred and fifty dollars.

R. W. TYLER,
Captain, U. S. Army, (retired).

Claimant's post-office address is Washington, D. C.
Claimant's attorney is Hon. R. B. Warden, Washington, D. C.

COUNTY OF WASHINGTON,
District of Columbia, ss:

Richard W. Tyler, having been duly sworn, on his oath says: I am the identical Richard W. Tyler named in the foregoing petition; as to the facts therein stated on my own knowlepge, they are true; as to those stated on information and belief, I believe them to be true.

R. W. TYLER,
Captain, U. S. Army, (retired.)

Sworn and subscribed to by said Richard W. Tyler before me this 14th day of May, A. D. 1880.

[SEAL.] G. W. BALLOCH,
Notary Public.

4 II.—*Traverse.—Filed May* 18, 1880:

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney-General.

5 III.—*Findings of fact and conclusion of law.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. On the 26th day of December, 1861, the claimant was enlisted in the military service of the United States, and served as an enlisted man till May 25, 1864.

On the 25th of May, 1864, he was appointed lieutenant of infantry, and served as such on the active list till December 15, 1870.

On the 15th of December, 1870, he was retired, and placed on the list of retired officers of the Army for wounds received in battle, with the rank of captain of infantry, under the provisions of the act of 1861, August 3, ch. 42, §§ 16, 17 (12 Stat. L., 289), and the act of 1866, July 28, ch. 299, § 32 (14 Stat. L., 337); that being the full rank of the command held by him in the service at the time such wounds were received.

II. Since his retirement, December 15, 1870, he has received three-fourths of the pay of the rank of captain, allowed by statute to a captain who has been in the service more than five and less than ten years, and no more.

CONCLUSION OF LAW.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is entitled to recover the sum of $1,203.14, for the reasons stated in the opinion.

IV.—*Opinion of the court.*

RICHARDSON, J., delivered the opinion of the court.

The claimant entered the military service of the United States as an enlisted man in the Army, December 26, 1861; was appointed lieutenant of infantry on the 25th day of May, 1864; was placed on the retired list December 15, 1870, with the rank of captain of infantry; and has thus been in continuous service from his first entry up to the time of bringing this action.

He sues for pay which he alleges has accrued to him as a retired officer beyond that which has been allowed and paid to him at the Treasury.

We must therefore determine what is the pay by law of a retired officer of the Army of the claimant's rank, and how it is to be computed.

6 Section 1274 of the Revised Statutes is as follows:

"Officers retired from active service shall receive seventy-five per centum of the pay of the rank upon which they are retired."

The rank upon which the claimant is retired is that of captain of infantry, designated in the pay section of the statutes as captain not mounted.

The pay attached to rank in the Army depends upon length of service.

For the first five years it is a fixed sum, as set forth in Revised Statutes, section 1261. It is increased at the end of each five years of service, under the following sections of the statutes:

Revised Statutes, section 1262:

"There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains, and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years of service."

Revised Statutes, section 1263:

"The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law."

Revised Statutes, section 1267:

"In no case shall the pay of a colonel exceed four thousand five hundred dollars a year, or the pay of a lieutenant-colonel exceed four thousand dollars a year."

Section 7, act of 1878, June 18, chapter 263:

"That on and after the passage of this act all officers of the Army of the United States who have served as officers in the volunteer forces during the war of the rebellion, or as enlisted men in the armies of the United States, regular or volunteer, shall be, and are hereby, credited with the full time they may have served as such officers and as enlisted

men in computing their service for longevity pay and retirement. And the retired list shall hereafter be limited to four hundred, in lieu of the number now fixed by law."

Notwithstanding the claimant has been in the Army continuously since December 26, 1861, a period of more than fifteen and less than twenty years, embracing three terms of five years' service each, the defendants contend that he is entitled to seventy-five per cent. of the pay of the rank of captain, unmounted, upon which he is retired, allowed by law to an officer of that rank who has served one, and only one, period of five years.

This they do on two grounds: First, that the closing words of section 1274 of the Revised Statutes, viz, "upon which they are retired," qualify the previous word "pay," so as to limit the annual pay of a retired officer for the rest of his life to that sum which he first became entitled to at the very point of time when he was retired.

We are unable to concur in such a construction. It is in conflict with the obvious and grammatical connection of the language of the section, and is not in accord with the manifest purpose for which the words "upon which they are retired" were added. Those words plainly qualify the word "rank" immediately preceding them, and thus specifically define the rank, and nothing more, which shall control, for the time being, the pay of retired officers.

All officers of the Army, whether on the active or retired list, with the single exception of chaplains, so far as we have observed, are paid according to their rank. (Woods' case, 15 C't Cl's, 151.) But officers sometimes have more than one rank, the rank attached to and incident to their office, and the rank specifically conferred under the law, which is independent of office, and is, as stated in Woods' case, "a designation or title of honor, dignity, or distinction conferred upon an officer in order to fix his relative position with reference to other officers in matters of privilege, precedence, and sometimes of command, or by which to determine his pay or emoluments."

The act of July 28, 1866, ch. 299 (14 Stat., L., 337), since altered (Rev. Stat., § 1254), provided:

"SEC. 32. That all officers of the Regular Army entitled to be retired on account of disability occasioned by wounds received in battle may be retired upon the full rank of the command held by them, whether in the regular or volunteer service at the time such wounds were received."

Under this act, while it was in force, the claimant who, by appointment and commission, was a lieutenant in the Army, holding the office of lieutenant, with rank of lieutenant attached, was retired with the higher rank of captain.

In order to avoid any ambiguity or uncertainty as to which rank, in cases of that kind, as well as in some other cases, it was intended should govern the pay of retired officers, certain qualifying words seem to have been added, specifying that it should be the "rank upon which they are retired," that is, the rank which they hold from time to time on the retired list, and which is to regulate their pay.

This does not necessarily refer to the rank which they held at the time of retirement any more than it refers to the pay at the time of retirement, for the rank of officers on the retired list has been many times changed in particular cases; and we held in Woods' case that Congress has the power to change the mere rank of officers without the necessity, under the Constitution, of a new appointment and new commission, and that pay follows and is governed by rank alone.

Thus there is nothing in section 1274 of the Revised Statutes to preclude the claimant from having his pay computed precisely as is that of an officer of his rank on the active list, subject only to the reduction of one-fourth part, as there provided.

Second. The defendants further contend that officers on the retired list are not entitled to the longevity pay allowed by section 1262 of the Revised Statutes, except for the periods of five years in which they were in the active service; that when they are placed on the retired list they cease to be in service; and so the periods therein specified cease to run.

We deem this to be an entire departure from the true meaning of the section.

The statute gives to each commissioned officer below the rank of brigadier-general additional pay for each term of five years' service; that is, service as a commissioned officer in the Regular Army, excluding only service in any other capacity, such as that of an officer in the volunteer service and that of a non-commissioned officer or enlisted man.

It is upon this construction that the term of service of cadets at the Military Academy has never been reckoned for longevity pay, because they are not commissioned officers. It is upon this construction that the service which an officer performed as a private or as an officer in the volunteer forces during the rebellion was excluded from the computation of service, until Congress passed the act of 1878, June 18, ch. 263, above cited, which expressly authorized such service to be credited to them.

The construction which the defendants urge would place retired officers wholly out of the service. That is certainly not the intention of the law, either expressed or implied. Section 1245 of the Revised Statutes makes a distinction between officers retired from active service only and officers wholly retired, which implies that the former
8 remain in service, though not in active service, while the latter are out of the Army altogether. This is the provision:

"When any officer has become incapable of performing the duties of his office, he shall be either retired from active service or wholly retired from the service, by the President, as hereinafter provided."

The same distinction is made in sections 1252, 1275. So wherever in the statutes active service is meant the word "active" is invariably inserted to qualify "service." (Rev. Stat., sections 1243–1245, 1249, 1251–1257, 1274.)

In the section now under consideration the word "active" is not used, and the word "service" is left unqualified, to receive its usual and natural interpretation.

Officers on the retired list still remain in the service. They hold commissions as officers of the Army, and by section 1094 of the Revised Statutes they are expressly designated as among those of whom the Army of the United States shall consist. It is true that they are generally exempt from active service. But they may be assigned to duty at the Soldiers' Home (Rev. Stat., 1259), and they are specially subject to many provisions of law, which are imposed upon them for the very reason that they are in service as officers of the Army. By Revised Statutes, section 1256, they are entitled to wear the uniform of the rank on which they are retired; their names are continued on the Army Register; and they are made "subject to the rules and articles of war, and to trial by general court-martial for any breach thereof."

The sixty-first article of war provides that "any officer who is con-

victed of misconduct unbecoming an officer or a gentleman shall be dismissed from the service." There is no doubt that officers may be dismissed from the retired list under this article, and in point of fact retired officers have been so dismissed. That could not be the case unless they are held to be in the service.

By section 1223 of the Revised Statutes, retired officers, like all other officers of the Army, are prohibited from holding any appointment in the diplomatic or consular service of the government, on the pain of being held to have resigned their places in the Army.

Besides, being officers in the Army, Congress can at any time impose upon them special duties, which they would be forced to perform.

These citations and illustrations are sufficient to show that officers do not cease to be in service by the mere fact of being placed on the retired list and relieved from active duties.

The language of section 1262 of the Revised Statutes, allowing longevity pay to each commissioned officer below the rank of brigadier-general, is broad enough to include the claimant, and to confer upon him the full benefit of its provisions, since he is a commissioned officer below the rank of brigadier-general. There is no exception of retired officers either in that section or in section 7 of the act of 1878, June 18, ch. 263, which extends its benefits so as to include service as officers in the volunteer forces during the war of the rebellion, or as enlisted men in the armies of the United States.

The defendants cite a passage from Roberts' case (10 C. Cls. R., 283), which seems to be in conflict with these views, freely admitting, however, that it was a mere dictum not applicable to the point then in controversy.

The only question involved in that case was whether or not the pay of the claimant as a retired officer with the rank of lieutenant-colonel was limited to three-fourths of $4,000 by force of the act of 1870, July 15, ch. 294, § 24 (16 Stat. L., 320, now Rev. Stat., § 1267), when
9 but for that section it would have been three-fourths of $4,200 under the general provision for longevity pay. We held then, as we now hold, that the pay of a retired officer is to be determined by first ascertaining what would have been his pay had he not been retired, and then allowing him seventy-five per cent. of that sum. The section which the claimant sought to avoid the force of, limited the pay of a lieutenant-colonel to $4,000; and we held that it was a limitation upon the amount of the full pay of a lieutenant-colonel under the general provisions, of which he, as a retired officer, could receive only seventy-five per cent.

We then inadvertently said that the seventy-five per cent. was computed upon the pay which officers were receiving at the time they were placed on the retired list. This language happened to be used because in that case the result was the same as it would have been under the construction now given, and both parties had made their computation with reference to that period of time. The questions now raised were not then in controversy, and were neither argued nor alluded to in the brief, and were not considered by the court.

There remains one other question which, although of less importance than those which we have been considering, has been raised, and we must therefore pass upon. It relates to the manner of computing the ten per cent. longevity pay, and the meaning of the words "current yearly pay" in section 1262 of the Revised Statutes. The defendants insist that the current yearly pay is the fixed annual pay, without the addition for longevity. Thus the pay of a captain, not mounted, is by

section 1261 of the Revised Statutes eighteen hundred dollars a year. For each term of five years' service the defendants would add ten per cent. of that sum only, $180.

That is a convenient method of calculation, since it avoids fractions of dollars, and may have been adopted by the pay officers for that reason, as it does not largely vary the result in any case. But it is not strictly accurate. "Current yearly pay" implies a pay which is subject to change as the years run on. The expression is nowhere found in the statutes except in this connection. It evidently means ten per cent. of the whole pay the officer is receiving, or is entitled to receive, at the time he becomes entitled to an increase of pay. Thus, for the first five years of service a captain, unmounted, receives $1,800; for the second five years, $1,980; for the third five years, $2,178; for the fourth five years, $2,395.80; and for the fifth five years it would be $2,635.38 but for section 1263, which limits the total amount of such increase not to exceed forty per centum of the "yearly pay" of the grade as provided by law, which would reduce the latter sum to $2,520.

It is significant of the intention of Congress that in section 1263 the limitation of the total amount of increase for length of service is a percentage of forty per cent., not upon the "current yearly pay," upon which, by the next preceding section, the periodical increase is to be computed, but is upon the "yearly pay of the grade;" thus making a distinction between "current yearly pay" and the unchanging "yearly pay of the grade," which we but adopt, follow, and apply with mathematical precision.

Retired captains, unmounted, are entitled to three-fourths of those sums respectively, according to the length of their services.

It follows that the claimant should have received—

After ten years' service as a commissioned officer, computed from May 25, 1874, to June 18, 1878, 4 years and 24 days, at the rate of $1,633.50 a year	$6,642	90
After 15 years' service, computed from December 26, 1861, under the act of 1878, June 18, ch. 263, § 7, allowing his term of service as an enlisted man to be included, from the date of the passage of that act to May 15, 1880, when this action was brought, 1 year 10 months and 27 days, at the rate of $1,796.85 a year	$3,428	99
	10,071	89
Having been allowed only	8,868	75
He is entitled to judgment for the balance	1,203	14

Judgment will be entered in favor of the sum of $1,203.14.

V.—*Judgment of the court.*

At a Court of Claims held in the city of Washington on the 28th day of February, A. D. 1881, judgment was ordered to be entered herein as follows:

The court on due consideration of the premises find for the claimant, and do order, adjudge, and decree that the said Richard W. Tyler do have and recover of and from the United States the sum of twelve hundred and three $\frac{14}{100}$ dollars ($1,203.14).

12 VI.—*Application of defendants for, and allowance of, appeal.*

From the judgment rendered in the above-entitled cause on the 28th day of Feb'y, 1881, in favor of claimant, the defendants, by their Attorney-General, on the 26th day of April, 1881, make application for, and give notice of, an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Assistant Attorney-General.

Filed April 26, 1881.

And now, to wit, April 26, 1881, it is ordered that the appeal of the defendants be allowed as prayed for.

13 VII.

In the Court of Claims.

RICHARD W. TYLER
vs.
THE UNITED STATES. } No. 12337.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court, of the final judgment of the court, of the application by the defendants for allowance of appeal to the Supreme Court of the United States, and of the allowance of same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington this 15th day of September, A. D. 1881.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 1075. The United States, appellant, vs. Richard W. Tyler. Court of Claims. Filed October 15, 1881.

FILED
DEC 30 1881

In the Supreme Court of the United States.

OCTOBER TERM, 1881.

THE UNITED STATES, APPELLANT,
vs.
RICHARD W. TYLER.
No. 1075.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1881.

THE UNITED STATES, APPELLANT,
vs.
RICHARD W. TYLER. } No. 1075.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

STATEMENT.

Upon the 26th of December, 1861, the claimant entered the Army as an enlisted man, and in this capacity served until May 25, 1864, when he was appointed first lieutenant of infantry. Whilst holding this commission he was *retired* December 15, 1870, for wounds received in battle, with the rank of captain. This was under the provisions of the act of 1861, August 3, ch. 42, §§ 16, 17 (12 Stat. L., 289), and the act of 1866, July 28, ch. 299, § 32 (14 Stat. L., 337). See *post*, p—.

At the time of retirement he had been in the Army

more than five and less than ten years, and since retirement he has been paid three-fourths of the salary of a captain, increased 10 per cent.

This suit was brought because the rate of pay was not increased 10 per cent. when claimant had been ten years in the Army, counting as well time passed in retirement as before; and because a further increase was not made when the fifteenth year from the date of his enlistment had been reached.

Should the right to include years passed in retirement in computing longevity be established, there will remain the further inquiry whether the per centum authorized for each five years of service should be computed upon the fundamental salary, or upon that salary as it may have been already increased by a ten per centum.

The rule of the War Department has been since 1870 (when the allowance was authorized) to calculate successive percentages upon the original salary as fixed by law, and according to this rule every officer as he reached the tenth, fifteenth, or twentieth year of active service has been paid.

The following extracts from circulars from the office of the Paymaster-General show the established construction:

[Circular No. 73.—Extract.]

PAYMASTER-GENERAL'S OFFICE,
Washington, July 22, 1870.

* * * * * * *

Par. 5. The emolument of 10 per cent. of the current yearly pay for each term of five years' service, whether in the volunteers or regulars, is to be reckoned in the same manner as the longevity ration has hitherto been reckoned, but only on the bare salary, not the salary increased by any previous accrement of emolument, and not in any case to exceed 40 per centum of the same.

Par. 8. Officers retired receive three-fourths of the pay (salary and increase) to which under this law they would be entitled in the active service, but no increase can accrue after retirement.

[Circular No. 83.]

FEBRUARY 23, 1872. (Same office.)

Par. 2. The Secretary of War has communicated to this office the following decision in reference to the percentage granted to retired officers: Under act July 15, 1870, "All retired officers *will be allowed to reckon the time passed in commission* up to July 1, 1870, in estimating the percentage granted by that act, provided the maximum had not already been reached. Officers retired after that date shall have only the percentage to which they were entitled at date of retirement.

[Circular No. 100.]

DECEMBER 29, 1873. (From the same office.)

Par. 2. The decision promulgated in paragraph two, of circular 83, from this office, has been misunderstood by many persons to include cases of officers retired on pay proper only, under section 17, act of August 3, 1861, for causes not incident to the service. It was not designed to apply to this class, as they have never been held entitled after retirement to the allowance of longevity rations, or to the percentage substituted therefor. By the twenty-fourth section of the act of July 15, 1870, retired officers of the class cited are entitled only to *three-quarters of the salary proper attached* to the grade held by them at the date of retirement, and to no percentage for service whatever.

The following are the provisions under which the retirement was made. Act of 1861, August 3; ch. 42, §§ 16, 17 (12 Stats. L., 289):

And be it further enacted, That if any commissioned officer of the Army, or of the Marine Corps, shall have become, or shall hereafter become, incapable of performing the duties of his office, he shall be placed upon the retired list and withdrawn from active service and command, and from the line of promotion, with the following pay and emoluments, namely: The pay proper of the highest rank held by him at the time of his retirement, whether by staff or regimental commission, and four rations per day, and without any other pay, emoluments, or allowances; and the next officer in rank shall be

promoted to the place of the retired officer, according to the established rules of the service. And the same rule of promotion shall be applied successively to the vacancies consequent upon the retirement of an officer: *Provided*, That should the brevet-lieutenant-general be retired under this act, it shall be without reduction in his current pay, subsistence, or allowances: *And provided further*, That there shall not be on the retired list at any one time more than seven per centum of the whole number of officers of the Army, as fixed by law.

SEC. 17. *And be it further enacted*, That, in order to carry out the provisions of this act, the Secretary of War or Secretary of the Navy, as the case may be, under the direction and approval of the President of the United States, shall, from time to time, as occasion may require, assemble a board of not more than nine, nor less than five, commissioned officers, two-fifths of whom shall be of the medical staff; the board, except those taken from the medical staff, to be composed, as far as may be, of his seniors in rank, to determine the facts as to the nature and occasion of the disability of such officers as appear disabled to perform such military service, such board being hereby invested with the powers of a court of inquiry and court-martial, and their decision shall be subject to like revision as that of such courts by the President of the United States. The board, whenever it finds an officer incapacitated for active service, will report whether in its judgment the said incapacity result from long and faithful service, from wounds or injury received in the line of duty, from sickness or exposure therein, or from any other incident of service. If so, and the President approve such judgment, the disabled officer shall thereupon be placed upon the list of retired officers, according to the provisions of this act. If otherwise, and if the President concur in opinion with the board, the officer shall be retired as above, either with his pay proper alone, or with his service rations alone, at the discretion of the President, or he shall be wholly retired from the service, with one year's pay and allowances; and in this last case his name shall be thenceforward omitted from the Army Register or Navy Register, as the case may be: *Provided, always*, That the members of the board shall in every case be sworn to an honest and impartial discharge of their duties, and that no officer of the Army shall be retired either partially or wholly from the service without having had a fair and full hearing before the board, if, upon due summons, he shall demand it.

Act of 1866, July 28, ch. 299, § 32 (14 Stat. L., 337):

SEC. 32. *And be it further enacted*, That officers of the regular Army entitled to be retired on account of disability occasioned by wounds received in battle, may be retired upon the full rank of the command held by them, whether in the regular or volunteer service at the time such wounds were received.

Sections 1274 and 1262 Rev. Stat. are as follows:

SEC. 1274. Officers retired from active service shall receive seventy-five per centum of the pay of the rank upon which they are retired.

SEC. 1262. There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years of service.

ASSIGNMENT OF ERROR.

1. The court erred in not dismissing claimant's petition.

2. So much of the judgment as consists of increment computed upon years spent upon the retired list is erroneous.

3. So much of the judgment as consists of increment computed upon previous increment is erroneous.

ARGUMENT.

Section 1274 Rev. Stat. was intended to determine the entire amount which officers of the class to which it relates can receive. This it does by reference to a definite and unvarying standard, to wit, "the pay of the rank upon which they are retired."

Pay of rank is in no way affected by length of service, for it is that certain sum which Congress has fixed for every officer having the same designation. (§ 1261 Rev. Stat).

He who for years has been entitled to the designation of colonel among the various grades of the Army acquires no different designation by mere lapse of time; and so far as pay is determined by his rank, he can receive no other amount than the officer whose commission has but recently been issued. If section 1274 is held to be the only authority for compensating officers retired from active service, the pay which the law has specified for a captain without regard to length of service must control this case.

II.

But it is maintained that section 1262 is general in its extent and applies to all officers in the Army, whether in the active service or upon the retired list.

It is to be observed, however, that the percentum is not in terms granted for each five years "in the Army." If such had been the form of limitation, a literal construction would doubtless include retired officers, for it is not contended that retirement displaces an officer from the service, or that he thereupon ceases to be a commissioned officer.

But section 1262 authorizes an allowance to commissioned officers "for each term of five years of *service*," but inasmuch as this form of grant does not distinctly include retired officers, and as the purpose and object of longevity is wholly disconnected with the nature and purpose of retirement, the law seems properly open to the construction which for years has been observed.

The decision of this case thus depends upon the meaning of the doubtful and indefinite words of section 1262 Rev. Stat.

The purpose of that section is evidently one deemed important and adapted to the permanent welfare of the several branches of the national forces, for it is adopted as well in the Navy and Marine Corps as in the Army, and so extensive is it that if the construction hitherto practiced by the department was erroneous, there is not an officer of five years' service in the Army, Navy, or Marine Corps, or a professor at the two academies, who has not been adversely affected thereby, and who cannot obtain a judgment accordingly as has this claimant.

In construing a feature common to each branch of the service, and which concerns so large a class of the public servants, it seems admissible to extend the examination beyond a possible literal signification of the statute, and if the language will not be distorted thereby, to conform the statute to the object to which it appears naturally applicable.

In Stone *vs.* Lidderdale (2 Anstruther's Reports, 533), which was as to the right to assign military half pay, McDonald, chief baron, remarked:

> * * * But in this case the public is immediately interested; the subject of litigation is a grant from them to their servants; the nature of that grant and the condition to which it is subject may well be ascertained from considering the ends of public policy in making the grant without admitting the same principles of decision in cases of a merely private nature.

In determining whether section 1262 Rev. Stat. applies to retired officers, it seems equally admissible to consider the object of the longevity allowance, and whether that object has any element in common with the object of retirement.

Longevity pay is chiefly from motives of policy and for the good of the service. It proceeds upon the same

principle that prevails in private affairs, that experience is more valuable than inexperience, and it is accordingly an inducement to competent and skillful officers to remain (2 Opin., 274).

The maximum of the allowance being 40 per centum of the initial salary is a liberal and practical distinction between those who have just entered upon duty and those who have served for twenty years.

By removing a cause for dissatisfaction which would otherwise naturally affect the older officers, indifferent service is avoided and interest is sustained. And at the period when an officer has become most efficient, he is encouraged to continue and not to resign (which, in time of peace, is practically *at will*) or to retire (§ 1243 Rev. Stat.).

The ultimate end of longevity is thus to perfect the active service by retention. Retirement has likewise the same general purpose, but the mode, although equally just, is the direct converse of that of longevity allowances.

Whilst the latter retains the more capable and increases their compensation, the former ascertains those who are incapable through age, wounds, or disease, and withdraws them from a position where they might be called upon, or might attempt to perform duty. Except where the incapacity is due to special gallantry—as in the present case—retirement results justly in a diminution of salary.

As no retirement can occur except where the officer is presumed to be, or is formally found, incapable of doing an officer's duty, so the system is developed and perfected by those direct statutory prohibitions upon the assignment of a retired officer to any duty.

Some argument is made to the contrary in view of section 1259 Rev. Stat., allowing their assignment to the Soldiers' Home, and of the provision in the Act of May 4, 1880 (21 Stat. L., 113), permitting their detail at private compensation to universities requesting it. But these employments, as was said in the Court of Claims, in deciding Collins *vs.* United States (15 Ct. Cl., 40), "are accompanied with benefits and privileges which render them desirable to the parties, and are not regarded as the imposition of official public service."

In the United States an officer upon the retired list is therefore incapable in fact and by law of performing or being called upon to perform any military duty. His pay cannot therefore be regarded as the pay of present service, since he can render none, but it is in the nature of a high pension for meritorious services or suffering in the past. In being thus a mark of past service alone lies the distinction between retirement pay and the half-pay system of the British army. The latter list includes both those whose services are temporarily not required and those who are permanently disabled. The retired list in this country is wholly composed of officers incapable of resuming duty.

Half pay in England is therefore regarded not merely as a remuneration for past military services, but also as an obligation on the part of the officer to return to his military duties whenever called upon.

The latter view is manifestly inapplicable to the officer who is retired under our laws, nevertheless the examinations which English courts have made where questions of half pay have arisen are of clear assistance in the present inquiry.

The earliest reported case is Stuart *vs.* Tucker (2 W.

Bl., 1137.) The argument was advanced that neither whole nor half-pay was assignable at law, since it was given on public grounds for the honor and support of the officer; and the doctrine was sustained after drawing the distinction that full pay is granted *pro servitio impendendo* while half pay *pro servitio impenso*.

This distinction is observed in Flarty *vs.* Ollum, 3 T. R., 681; Barwicke *vs.* Reade, 1 H. Bl., 628; McCarthy *vs.* Goold, 1 Ball & Beatty, 387. See, also, Lidderdale *vs.* Duke of Montrose, 4 T. R., 248; Gibson *vs.* Ea. Ind. Co., 7 Scott, 95, and Stone *vs.* Lidderdale, 2 Ant., 533.

In the latter, various cases were reviewed, and the doctrine (much more pertinent to our system than to the English) settled that half pay is a reward for *past* services.

The distinction was drawn between half pay and a pension in that by the latter no future benefit to the state is expected from the recipient, while the partial object of half pay in England is to secure a possible service.

The true relation of a retired officer is exactly described in deciding the matter of Grenfell *vs.* The Dean and Canons of Windsor (2 Beav., 549):

* * * In the next place it is said that he has no right to assign this canonry, because the share of the revenues was given to him in consideration of certain future duties to be performed. Now, if it had been made out that the duty to be performed by him was a public duty, or in any way connected with the public service, I should have thought it right to attend very seriously to that argument, because there are various cases in which public duties are concerned in which it may be against public policy that the income arising for the performance of these duties should be assigned, and for this simple reason, because the public is interested not only in the performance from time to time of the duties, but also in the fit state of preparation of the party having to perform them. Such

is the reason in the cases of half pay where there is a sort of retainer, and where the payments which are made to officers from time to time are the means by which they, being liable to be called into public service, are enabled to keep themselves in a state of preparation for performing these duties. So, also, when a pension or remuneration is given for a purpose which tends less directly to the public benefit, as, for instance, was the case in Davis *vs.* The Duke of Marlborough, then the pension was given to the Duke of Marlborough as a memento of the gratitude of the nation, and as a reward for his distinguished public services; and it was then the intention of the legislature that it should be kept in mind that it was for these great services it was given. In that case the pension was held inalienable, because it was considered that one of the objects of giving the pension, namely, for having a perpetual memorial of national gratitude for public services, would be entirely lost, and so in the course of that case Lord Eldon said, in the way of illustration, and in allusion to the pension of a great public officer, that it could not be aliened, because that public officer must not be allowed to fall into such a situation as to make it difficult for him in consequence of any pecuniary embarrassment to maintain the dignity of his office.

If the purposes of the longevity increase and of retirement be as above indicated, section 1262 has obviously no application except to officers in active service, for those retired being a class of officers who are paid for past service only, and who can by no possibility render a future service, there is no pertinency in extending to them a provision which is intended to improve the efficiency of the Army by inducing its able officers to remain. In strictness, every withdrawal from the retired list would be a material benefit to the government.

The form of the grant manifests the intention appellants have asserted. "There shall be allowed and paid * * * 10 per centum of their current yearly pay for each term of five years of *service*." (Section 1262 Rev. Stat.)

Service imports action and a rendering of actual labor or aid in accordance with an obligation so to do.

WORCESTER:

4. Duty; office; employment; business. To qualify themselves for public service.—*Swift.*

7. Military duty or employment.

8. A military achievement or exploit. To see service (mil.); to be in actual collision with an enemy.

WEBSTER:

1. The act of serving; * * * the performance of labor for the benefit of another or at another's command. * * *

5. Duty performed in or appropriate to any office or charge; official function; hence specifically military or naval duty; performance of the duty of a soldier.

The word has frequently been used in other statutes with the signification we claim for it in section 1262 Rev. Stat. Sections 1096, 1097 Rev. Stat. authorize aids to General and Lieutenant-General to have certain rank "while serving on the staff."

Section 1112: Indian scouts to be discharged "when the necessity for their *service* shall cease."

Section 1145: Commissioned officers "serving in the field may purchase rations," &c.

Sections 1208, 1209: Brevets for distinguished conduct or public *service* in the presence of the enemy to bear date from the action or *service* for which the officer was brevetted.

Section 1235: "Details to special *service* in the field."

Claimant says, however, the expression means for five ears *in the Army.*

But when the statutes use "service" as synonymous with "army" or "in commission," the definite article precedes it.

Section 1184: When volunteers or militia "are called into the *service* of the United States."

Section 1206: Officers of engineers failing on re-examination "to be dismissed the *service*."

Section 1216. Soldier to have certificates of merit "when he shall have distinguished himself in the *service*."

Section 1217: "None of the provisions of this title relating to the organization of the Army shall be construed to vacate the commission of any officer now properly *in the service*."

Section 1228: No officer of the Army dismissed "from *the service*" shall ever be "restored to the military service."

Section 1257: When an officer is retired from active service, the next officer to be promoted "according to the established rules of *the service*."

Section 1314: The superintendent of the cadets "may be detailed from any arm of *the service*."

Also sections 1223, 1226, 1227, 1253, 1285, 1286, 1289, 1290, 1292; and denoting "the Army" the following articles of war employ "*the* service":

Articles 3, 4, 6, 13, 14, 15, 18, 19, 26, 47, 48, 54, 58, 59, 60, 61, 65, 71, 75, 97, 98, 99, 100, 122, 124.

So if Congress had intended to give 10 per centum for each five years *in the Army*, the expression as repeatedly before would have been "each five years in *the* service.'

III.

CURRENT YEARLY PAY.

The word "pay," as used in the statutes, concerning the compensation of the officers of the Army, has a well-

settled signification. It denotes that fixed sum which is specifically appropriated for each particular grade, and any construction which would enlarge its meaning to embrace allowances which are separately given by law when the intention so to do is not clearly expressed would lead to uncertainty and confusion.

"Current yearly pay" is used because the statute is dealing with a period of five years, and with no other purpose than to designate upon which one of the five yearly pays the computation is to be made.

Salaries being liable to annual changes by law, it might be that in a given five years an officer's pay had as many times been varied by law.

Had, therefore, the phrase been merely "yearly pay" the statute would become in the case stated too indefinite for execution. For the question would at once arise upon the pay of which of these years is the percentage to be calculated, and there would be no means in the law itself of deciding.

It would give equal authority to compute the allowance upon the first year's salary as upon the fifth, and upon the highest as upon the lowest, but *current* yearly pay prescribes the pay of the year *then passing* as the basis, and the law is thus made certain and practicable.

Such is the office of the word "current," and for this reason alone it was introduced into the statute.

The increment for longevity is upon current yearly *pay* alone, and not upon *pay* and *allowances*.

But that increment is itself strictly an "allowance," and not what is denoted by the word "pay" when used in the statutes. "* * * there shall be *allowed*

and paid * * * 10 per centum of their current yearly *pay*," which fixes a basis entirely distinct from and exclusive of any allowance.

S. F. PHILLIPS,
Solicitor-General.
GEORGE C. WING.

IN THE

Supreme Court of the United States.

October Term, 1881.

THE UNITED STATES,
APPELLANTS,
vs.
RICHARD W. TYLER,
APPELLEE.
No. 1075.

Appeal from the Court of Claims.

BRIEF FOR APPELLEE.

I. The facts are undeniably such that, under the pleadings in the court below and the findings of that court, it is necessary to determine, as *matter of law*, whether the appellant is in the *service*, though not in the *active service*, of the United States, in the army, and entitled to the compensation (*not* gratuity, we earnestly insist) that has become known as *service* (or *longevity*) *pay*.

II. My claim that he *is*, and at the time referred to in his petition *was*, in the service, though not in the active service of the United States, as a military officer, as he alleges, represents much study which, I trust, has been conducted in the spirit of devotion to the interests of all concerned. I have no doubt, at all, about the soundness of this claim.

III. As representative of wholly unexceptionable study, and as free from doubt, is my proposition that the appellant is perfectly entitled to be compensated as he claims in the truly admirable argument that, at my earnest instance and request, he offers in his own behalf.

I here adopt that argument, in every particular whatever.

IV. The nature of the case requires full application of the rules relating to *judical notice*. I refer to the opinion and citations of Mr. Justice SWAYNE in *Brown* vs. *Piper*, (*a*) and respectfully request the court to give us the full benefit of the rules in question.

V. Rightly understood those rules extend to all the statements in the appellant's petition, and to all the statements which he makes in argument.

VI. Regarding fairly all the statements just referred to, we can hardly fail to see that the discrimination made in practice between retired officers and officers in active service, as to service or longevity pay, is far, indeed, from just and wise.

VII. Nobody pretends that the law expressly *says* that such discrimination shall be made. It is, we most respectfully submit, entirely through a false *construction* of the written law that that unwise, unjust discrimination has been made.

VIII. The wise and just construction which the plaintiff calmly and, yet, eloquently argues for, does not involve a wresting of the legislative language, so that the *spirit* of it may rise above the *letter*. Sometimes it is necessary to do violence to *words* in order to be just to *meaning*. Here, however, every word may have complete effect, according to its usual and natural significance, and the construction so produced will be precisely that which we insist is just and wise.

(*a*) 91 U. S., (1 Otto,) 42.

IX. The legislative language clearly, plainly and directly says that the so-called longevity pay shall be given to "each and every commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay." (*a*) Now, each and every retired officer of the army is a "commissioned officer." There is no reason in the world for inserting, by construction, an exception as to retired officers.

X. Is it considered that the words "officers retired from active service shall receive seventy-five per centum of the pay of the rank upon which they are retired," (*b*) forbid the wise and just construction we insist on?

I submit that there is absolutely nothing in those words to work against the argument here made. They are not in the least opposed to the construction that we deem the true one.

A provision of the law runs thus: "The officers of the army shall be entitled to the pay herein stated after their respective designations." (*c*) Then, after having made the so-mentioned designations, the law proceeds to provide, as follows, for what is called in the margin service pay:

"There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years' service."

XI. If construction is to be resorted to, surely the construction must be liberal in favor of the great object of the law—fit compensation of the class of citizens of whom the ~~plaintiff~~ is a specimen.

(*a*) Rev. Stat., p. 219, § 1262, act of July 15, 1870, vol. 16, p. 320.
(*b*) Rev. Stat., p. 220, 1274.
(*c*) Rev. Stat., p. 219, § 1261.

XII. That object I need not endeavor to exalt. I have, indeed, no disposition to make over-much of it. I do not argue on the supposition that the *only* merit of commanding interest is martial merit. But I do respectfully submit that it would not become a Court, particularly representing the majesty of the Republic, and its justice and its magnanimity, where there is question of pecuniary matters, to deal otherwise than liberally with such citizens as those of whom the ~~plaintiff~~ is, I have the right to say, a very interesting type.

XIII. In this connection, it is well to say that we rely completely on a true construction of the language of Chief Baron McDonald, in the case of *Stone* vs. *Lidderdale*, (*a*) cited, and we submit, inaccurately construed, on the other side.

I ask the court to weigh these words of the Chief Baron in that very interesting and important case, which *overrules* some of the cases quoted on the other side, and is distinctively a reviewing case :

" The principle of policy upon which the late cases have gone, does not seem liable to the objections that have been raised to it. To discuss the question of public convenience before establishing the common agreements between man and man, would lead to endless confusion. *But, in this case, the public is immediately interested ;* the subject of litigation is a grant from them to their servants ; the nature of the grant and the conditions to which it is subject, may well be ascertained from considering the ends of public policy in making the grant, without admitting the same principle of decision in cases of a merely private nature. But the case is of considerable consequence, and the decisions appear contradictory ; the court will look into them."

After looking into them, accordingly, the court pronounced

(*a*) 3 Anstruther's Rep., 533.

a decision, of which the *syllabus*, (entirely correct,) runs thus:

"An assignment of the half-pay of an officer in the army, is bad in equity, as well as at law."

Assigning reasons for that judgment, Chief Baron McDonald says, *not* that "half-pay is a reward for past services," but this:

"Half-pay is intended by the statute to provide decent maintenance for experienced officers, *both as a reward for past services, and to enable them to preserve such a situation that they may always be ready to return into actual service.*"

Almost fatally the Great Rebellion taught this country and the world some ever-memorable and entirely invaluable lessons, in the science and the art of War, as well as in the policy of Peace, as far as it requires observance of the still essential rule of prudential national life, "In time of Peace prepare for War." Quickly-gained skill, and the great moral force of valor, showed their inestimable worth in that so direful time. Experience has not, indeed, ceased to be valuable in the sphere of martial life; it still remains as precious, in some respects though not in all, as it was in the days when individuals counted for so much more, in martial enterprises, than they can do now. But one may well remember that a long time has elapsed since Napoleon, writing to Junot, when the latter was in Portugal, reminded him that in War, the *moral* force is the *physical* as three to one.

The *moral* qualities of martial merit do not very greatly, though they do somewhat, depend on mere experience—of which great truth the eminently creditable record of the appellant is itself a very striking illustration—and those qualities were doubtless much considered in providing for service or longevity pay.

But though the opinion of Chief Baron McDonald, in the cited case of *Stone* vs. *Lidderdale*, does not expressly mention things other than experience in martial merit, as considered in providing for half-pay, it is a highly valuable opinion, delivered as it was as long ago as 1795.

It adds to its already-quoted words the following expressions:

"It materially differs, therefore, from the general case of expectancies, which certainly may, in equity, be assigned. By such assignment no public interest is thwarted. Thus, a pension is equally uncertain as half-pay; but, *as no future benefit is meant to arise to the state from granting it*, a material distinction arises between them."

With those expressions may well be read this language of the case of *Grenfell* vs. *The Dean and Canons of Windsor*, (*a*) cited on the other side, but highly acceptable to *this* side:

"It is said that he has no right to assign this canonry, because the share of the revenues was given to him in consideration of certain future duties to be performed. Now, if it had been made out that the duty to be performed by him was a public duty, or in any way connected with the public service, I should have thought it right to attend very seriously to that argument; because there are various cases in which public duties are concerned in which it may be against public policy that the income arising from the performance of these duties should be assigned, and for this simple reason, because the public is interested not only in the performance from time to time of the duties, but also in the fit state of preparation of the party having to perform them. Such is the reason in the cases of half pay where there is a sort of retainer, and where the payments which are made to officers from time to time are the means by which they, being liable to be called into public service, are

(*a*) 2 Beav., 549.

enabled to keep themselves in a state of preparation for performing these duties. So, also, when a pension or remuneration is given for a purpose which tends less directly to the public benefit, as, for instance, was the case in *Davis* vs. *The Duke of Marlborough*; there the pension was given to the Duke of Marlborough as a momento of the gratitude of the nation, and as a reward for his distinguished public services; and it was there the intention of the legislature that it should be kept in mind that it was for these great services it was given. In that case the pension was held inalienable, because it was considered that one of the objects of giving the pension, namely, for having a perpetual memorial of national gratitude for public services, would be entirely lost, and so in the course of that case Lord Eldon said, in the way of illustration, and in allusion to the pension of a great public officer, that it could not be alienated, because that public officer must not be allowed to fall into such a situation as to make it difficult for him in consequence of any pecuniary embarrassment to maintain the dignity of his office."

This is perfectly consistent with all that is said by Chief Baron McDonald in *Stone* vs. *Lidderdale* as well as with all that we claim in the case at Bar, when what we say is rightly understood.

As long as anybody is an officer of the United States army, *whether retired or unretired*, the Congress, the creator and preserver of the martial forces of the land, can put that man into a place of *active* military service. Every retired officer is liable not only to the performance of the active duties *now* exceptionally provided for, but to the performance of any other active martial duties which the great War Power of the country may prescribe.

We must not view this matter narrowly. It calls for broad as well as high consideration.

We admit that it is well said on the other side, that "longevity pay is chiefly from motives of policy and for the good

of the service." All the difference is as to *what* the good of the service requires.

The brief for the appellants cites 2 Opin., 274, (meaning 2 Opinions of Attorneys-General,) as though it were, but certainly it is *not*, to the point, that "longevity proceeds upon the same principle that prevails in private affairs—that experience is more valuable than inexperience,—and it is accordingly an inducement to competent and skilful officers to remain."

On looking into the characteristically fine opinion of Mr. Berrien in that case, I found that this is just the *neb* of it as far as it concerns the controversy here:

"I think the additional compensation was designed as the reward of continuous service under commissions existing at the date of the act."

The act was that of May 24, 1828.

The term "service," here, means just what it must be found to mean, on giving due effect to the masterly argument of my client, all of which I have already formally adopted, and no part of which shall I allow myself to reiterate in this brief.

But we have yet to notice, in terms, the proposition on the other side, that "the ultimate end of longevity pay is . . . to perfect the service by retention." Surely, this is not a broad, strong, solid theory, such as the nature of the matter under view requires.

Retention and *retirement*, equally, are objects of the policy here under criticism. Both are good, each in its own peculiar way.

The spirit and the objects of that policy appeared to me, some time ago, (before the trial of the cause below,) so fully and so admirably comprehended by my Client, (who had been, under my direction, a Student of the Law,) that I sur-

prised him with the request to make an argument in his own behalf. By his compliance, I submit, he has rendered an important service to the jurisprudence of the country he so well served in the sphere of soldiership.

The argument he here presents is an exhaustive one, distinctively his own, although it partly represents quite frequent and protracted conferences between client and counsel. I commend it, heartily, to the attention of the court; and I now use it, word for word, as part of my own effort to convince the court that the claims which I uphold are perfectly correct and true, in point of law and in point of fact.

A practised pen could easily repeat it, in an altered form; but I rely on it, just as it is; and I submit that it is absolutely unanswerable, on all points, from the beginning to the end.

In one sense, it is eminently lawyerlike, while in another sense it may be said to be decidedly unlawyerlike.

It can be reconciled completely with the whole design and spirit of the opinion rendered by Chief Baron McDonald in *Stone* vs. *Lidderdale*.

That sound and sensible opinion adds to already-quoted words the following:

"As in the case put in *Dyer*, the annuity granted to a man on his being created a Duke, for support of his dignity, could not be granted over; so the half-pay, *being given for a similar reason of public policy*, cannot be transferred; to use the words of my Lord Dyer, 'it is an incident to the cause for which it is granted,' and cannot be separated from it."

May it please the court, not even in a Republic can considerations in respect to *dignity* in modes of living, on the part of persons in the service of the public, be regarded as of no account. Both dignity and decency should be re-

spected as within the contemplation of the public policy, to which attention is here drawn.

There is no question here as to the *power* of the Government: the question turns on the construction of a law that is unquestionably constitutional. But let us fairly take into consideration, and consider thoroughly, the nature and the bearings of the controversy here presented to the court.

The plaintiff, who, as has been intimated, seems to me a very interesting type of citizens that have peculiarly good claims to the consideration of their fellow-citizens, whether in or out of the judicial courts, well calls upon your Honors not to forget, that officers of the army are by the nature of their profession, unfitted for the ordinary vocations of life; and that retired pay is their main dependence for a support for themselves and their families in their old age. He points out that the service pay is not provided because the service of the officer is more valuable after fifteen or twenty years' service than it is after five or ten years, but to enable him to meet his necessities, and live respectably, at a time of life when his expenses are very justly expected to be greater than they were in earlier life, and as a reward for his sacrifices or for long and faithful service. And he pertinently and quite strongly adds expressions which, although I have said that I would not reiterate his words, I must allow myself to quote. I mean the words:

"Will any one say that the officer who, early in his military career, becomes disabled in the service by wounds or disease, shall not claim as much for longevity as his brothers, who escape harm and continue to enjoy their physical powers, good health, wholesome service, full pay, and promotion?"

It is thus apparent that the questions here presented have relation to concerns of very great importance to the common weal of the republic and to humanity itself.

The ~~plaintiff~~ appellee simply, but unanswerably adds, that the retired officers do not expect an equivalent for the loss of limb or health; nor do they ask to be continued in the line of promotion; but that the accruing longevity pay which was intended to meet the growing necessities of their advancing years, should not be denied them after they have become disabled in the performance of their duties as soldiers—that retirement does not arrest the increasing necessities of the officer, nor release him from his obligation to maintain the respectability and dignity of a gentleman.

In presence of considerations such as those the ~~plaintiff~~ appellee thus unflourishingly raises, I would confidently ask the court to overrule even a *series* of erroneous decisions, if there were one, holding that the law relating to the pay of retired officers is not as we insist it is. But, at least since the unanimous opinion of the Court of Claims in the case below was rendered, there has been not one decision in our way—and, now, it is with perfect confidence that we insist that we are very clearly right.

R. B. WARDEN,
Counsel for Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1881.

THE UNITED STATES,

APPELLANTS,

vs.

RICHARD W. TYLER,

APPELLEE.

No. 1075.

Appeal from the United States Court of Claims.

BRIEF AND ARGUMENT ON BEHALF OF APPELLEE,

BY HIMSELF.

WASHINGTON, D. C.
GIBSON BROTHERS, PRINTERS.
1882.

IN THE

Supreme Court of the United States.

October Term, 1881.

THE UNITED STATES, Appellants,

vs.

RICHARD W. TYLER, Appellee.

No. 1075.

Appealed from the United States Court of Claims.

BRIEF AND ARGUMENT FOR APPELLEE.

May it please the Court:

Appreciating and respecting as I do the majesty of this tribunal, it is with much diffidence that I am here in the *dual* relation of client and advocate. I appear, however, at the instance of able counsel, and trust, therefore, that I may in a measure be relieved from the odium of that maxim which questions the wisdom of a client who is his own lawyer. I had not expected to be accorded the distinguished honor of presenting this cause to the court in person, and that I have the pleasure of that distinction is due to the generosity of my learned counsel, Judge WARDEN, in whose legal ability and sound judgment I have unbounded confidence.

Not claiming to be a lawyer, it seems fit that I should in

advance beg the patient and considerate indulgence of the court. The questions here to be determined are of some magnitude, and by no means unimportant, as they involve the legal rights of a considerable number of very worthy and meritorious citizens.

STATEMENT.

The appellee entered the military service of the United States on the 26th day of December, 1861, as an enlisted man, and served as such until May 25th, 1864, and from May 25th, 1864, to December 15th, 1870, as a commissioned officer on the *active list*, and since December 15th, 1870, as a captain on the *retired list*, making continuous service since December 26th, 1861. The appellee insists that under a fair construction of the statutes he is entitled to compute the *percentage increase* allowed by law to officers of the army for *length of service*, upon the *whole amount of yearly pay* which he has been entitled to receive from time to time, (since July 1st, 1870;) and in making such computation he is entitled to count *service on the retired list the same as active service;* whereas the appellants have withheld from him all such percentage increase, except for the five-year term which had accrued prior to his retirement from active service, computed upon the *bare salary of his rank or grade.*

LAWS RELATING TO LONGEVITY PAY.

Sec. 15 of the act of July 5th, 1838, [*a*] provided that officers of the Army below the rank of brigadier-general should receive an extra ration for each term of five years' service. Sec. 16, act of August 3d, 1861, [*b*] (creating the retired list,) provided that the pay of officers on the retired list should be "pay proper, and four rations per day, and

(*a*) 5 Stat., C. 162, p. 258.
(*b*) 12 Stat., C. 42, p. 290.

without any other pay, emoluments, or allowances." The language of this law left no question as to what pay a retired officer should receive; indeed, it expressly limited it to *pay proper* and four rations per day, "*and no more.*"

This statute was not changed until the passage of the act of March 2d, 1867, [*a*] which is in words as follows:

"*And be it further enacted*, That section fifteen of the act to increase the present military establishment of the United States, and for other purposes, approved July 5th, 1838, be amended so that general officers shall not hereafter be excluded from receiving the additional ration for every five years' service, and it is hereby *further provided* that *officers on the retired list of the Army* shall have the same allowance of additional rations *for every five years' service as officers in active service.*"

After the passage of this act the Department allowed retired officers to reckon *all time* on the retired list the same as time on the active list for longevity *rations* until the act of July 15th, 1870 (known as the salary act) (*b*) went into operation. Sec. 24 of that act begins as follows: "And be it further enacted that the pay of the officers of the army shall be as follows;" and after fixing the *full* pay of the different grades, continues as follows: "The pay of aide-de-camp to major-general shall be $200 per annum in addition to the pay of his rank. The pay of aide-de-camp to brigadier-general shall be $150 per annum in addition to the pay of his rank. The pay of acting assistant commissary shall be $100 in addition to the pay of his rank; and there shall be allowed and paid to *each* and *every* commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per centum of their *current yearly pay* for *each* and *every* term of five years' service, provided that the total amount of such increase for *length of service* shall in no case exceed forty per

(*a*) 14 Stat., C. 145, p. 423.
(*b*) 16 Stat., C. 29, p. 320.

centum of the yearly pay of his grade as *established by this act*;" * * * "*Provided further*, That the pay of a colonel shall in no case exceed $4,500 per annum, nor the pay of a lieutenant-colonel $4,000 per annum, and these sums shall be in full of all commutation of quarters, fuel, forage, servants' wages and clothing, *longevity rations*, and all allowances of every name and nature whatever, and shall be paid monthly by the paymaster. *Officers retired from active service shall receive seventy-five per centum of the pay of the rank upon which they are retired.*" The foregoing provisions of law are now embraced in sections 1261, 1262, 1263, 1267, 1268, and 1274 of the Revised Statutes, now in force. Sec. 7 of the act of June 18th, 1878, [*a*] credits all officers of the army of the United States with the full time they may have served as enlisted men, whether in the regular army or as volunteers, in computing their "service for longevity, pay, and retirement."

The foregoing comprises all the laws granting longevity pay to officers of the army, also the laws fixing the pay of retired officers.

I may observe here that the act of July 15th, 1870, known as "the salary act," went into operation as of date July 1st, 1870.

OFFICIAL INTERPRETATION OF THE LAW RELATING TO LONGEVITY PAY.

[CIRCULAR, No. 73. EXTRACT.]

PAYMASTER GENERAL'S OFFICE,
WASHINGTON, *July* 22, 1870.

* * * * * * * * * * *

"**Par. 5. The emolument of 10 per cent. of the current yearly pay for each term of five years' service, whether in the volunteers or regulars, is to be reckoned in the same manner as the longevity ration has hitherto been reckoned, but only on the**

(*a*) 20 Stat., C. 263, p. 150.

bare salary, not the salary increased by any previous accrument of emolument, and not in any case to exceed 40 per centum of the same. * * * * * * * *

"Par. 8. Officers retired receive three-fourths of the pay (salary and increase) to which, under this law, they would be entitled in the active service, but no increase can accrue after retirement."

[CIRCULAR 83.]

FEBRUARY 23d, 1872, Same office.

"Par. 2. The Secretary of War has communicated to this office the following decision in reference to the percentage granted to retired officers. Under act of July 15, 1870, 'All retired officers *will be allowed to reckon the time passed in commission*, up to July 1st, 1870, in estimating the percentage granted by that *act*, provided the maximum had not already been reached. Officers retired after that date shall have only the percentage to which they were entitled at date of retirement.'"

[CIRCULAR No. 100.]

DEC. 29th, 1873. From the same office.

"Par. 2. The decision promulgated in paragraph two, of circular 83, from this office, has been misunderstood by many persons to include cases of officers retired on pay proper only, under section 17, act of August 3d, 1861, for causes not incident to the service. It was not designed to apply to this class, as they have never been held entitled after retirement to the allowance of longevity rations or to the percentage substituted therefor. By the 24th section of the act of July 15th, 1870, retired officers of the class cited are entitled only to *three-quarters of the salary proper attached* to the grade held by them at the date of retirement, and to *no percentage for service whatever*."

Noting the bearings of these circulars, I beg to impress upon the court the significant fact that the statutes, so far as they relate to the *percentage increase for length of service*, make no distinction whatever between officers on the *active* list and officers on the *retired* list, *nor between those on the retired list*. Nor do they draw any distinction between *retired service* which accrued *prior* to July 1st, 1870, and that which has accrued *since* that date. While circular 73, before cited, draws a distinction between service on the *active* list and *retired* service, in that it allows one to be reckoned

for the percentage increase, and excludes the other, and circular 83 draws a distinction between retired service which accrued *prior to July 1st*, 1870, and that which has accrued *since that date* by allowing the former to be reckoned in computing the percentage increase, and excluding the latter from such computations. Again, circular 100 excludes a certain class of retired officers from the benefits of *any percentage increase whatever*, and referring again to circular 73, it will be observed that it limits the percentage increase to a computation upon the *bare salary of the grade*, where the law provides that it shall be computed upon the "*current yearly pay.*"

Before entering upon this discussion I deem it proper to state the particular points which we expect to maintain, and which we shall consider, in the order in which they are here mentioned:

First. We confidently expect to convince this Honorable Court beyond the semblance of a doubt that retired officers of the army are as conclusively *in service* as they were prior to retirement.

Second. That the pay of the *rank or grade of officers on the retired list is definitely established by law, and, as established, constitutes the basis upon which their percentage increase for length of service* MUST *be computed.*

Third. That the *current yearly pay* of all officers, either active or retired, is the *aggregate amount of yearly pay* which they are entitled to receive for the time being. Now, as the court is not bound to view the questions here in controversy, from any prescribed stand-point, and as we are desirous of the fullest investigation, I shall, so far as practicable, if I may be indulged, consider at the proper time *all* the points which have heretofore been raised against this claim, though the same points may not be here raised by the appellants.

Approaching the first point for consideration, the law relating thereto is significant. It runs as follows: "There shall be allowed and paid to *each* and *every* commissioned officer below the rank of brigadier-general, including chaplains and others having assimilated rank or pay, ten per centum of their *current yearly pay* for *each* and *every* term of five years' service, provided that the total amount of such increase for *length of service* shall in no case exceed forty per centum on the yearly pay of his grade *as established by this act*." Now, there is nothing ambiguous about this statute. It is *broad*, and includes not only *all* commissioned officers below the rank of brigadier-general, but *others* having assimilated rank *or pay*. It is conceded by all that retired officers below the rank of brigadier-general are *commissioned officers*, and if they are *in service* then they are unquestionably entitled to reckon their *retired* service the same as *active* service in computing the percentage increase for *length of service*. We are led then to the consideration of the first point in controversy, to wit:

ARE RETIRED OFFICERS IN SERVICE?

On the sixth page of my learned adversaries' "brief" they make use of these words: "It is not contended that retirement displaces an officer from the service, or that he thereupon ceases to be a commissioned officer." Now to the average English scholar this would concede the point now under discussion, but as my friends on the other side have followed their admission with an argument to prove that retired officers are *not in service*, it would seem as though they were not in earnest, or that they rely upon some peculiar interpretation to relieve their language of its natural significance. I must, therefore, pursue my argument on this point.

An officer of the Government must be held to be in ser-

vice so long as he is subject to orders under the laws with respect to his office. The Executive cannot command men who are not in the public service. If a retired officer is not in service, then he has ceased to be an officer by virtue of his retirement, and consequently is not in any way subject to the authority of the Executive as such; and yet retired officers were from the creation of the retired list to Jan. 21st, 1870, held subject to assignment to any duty they were able to perform, at the discretion of the President. [*a*] The act of Jan'y 21, 1870, [*b*] relieved them from duty and prohibited their assignment to duty; but this act was so modified, by sec. 23, of the act of July 15th, 1870, as to admit of their being detailed to serve as professors in colleges, and shortly after, the law was still further modified, so as to admit of their assignment to duty at the Soldiers' Home.

Now, a retired officer must be in service or the President could not assign him to duty. Sec. 1094 of the Revised Statutes expressly states that *officers of the army on the retired list are a part of the army of the United States*, and from the creation of the retired list they have been held subject to discipline.

Sec. 18 of the act of August 3d, 1861, now sec. 1256 Revised Statutes, is in words as follows: "Officers of the retired list shall be *entitled to wear the uniform of their respective grades, shall continue to be borne on the army Register, and shall be subject to the rules and articles of war, and to trial by general courts martial for any breach of said articles.*" The 5th article of war forbids that they shall use any contemptuous or disrespectful words towards the President of the United States, the Vice-President, or the Congress, on pain of being cashiered, or otherwise punished at the discretion of a court-martial. The 83d article

(*a*) 12 Stat., C. 42, p. 291, and C. 200, p. 596.
(*b*) 16 Stat., C. 19, p. 62.

of war is in words as follows, viz: "*Any commissioned officer convicted before a general court-martial of conduct unbecoming an officer and a gentleman shall be dismissed from the service.*" Now, as they are held by the statutes and articles of war subject to trial and dismissal *from service*, they *must be presumed to be in service.* Again, Article five of the amendments to the Constitution limits trials by courts-martial to the *land* and *naval* forces of the United States. The law holds retired officers subject to such trials, and a number of retired officers have been tried by general courts-martial and dismissed from the service. Is this law void, and are these trials a nullity? This court has decided that an officer who, on his own application, was ordered to his home to wait orders, must be held to have been on duty while so waiting orders, and entitled to full duty pay. (*United States* vs. *Williamson*, 23d Wallace, page 411.) In all their relations to the Government, save the matter of *computing longevity pay*, retired officers have always been held to be in service, and unless it is held that they are not in service, they must be allowed to include time on the retired list in computing length of service for the longevity pay.

Now, while I attach but little importance to the points which have been urged in contravention of the foregoing argument, I deem it quite proper to give them passing notice. The court below was told, with much flourish, that "*years of retirement are not years of service.*" Lieut. W. P. Hogarty lost an arm at the shoulder in battle, and was made permanently deaf, and in consequence was *retired without longevity pay and without promotion.* He insists that whether years of retirement are years of service or not, "*years of suf-*
"*fering are not years of idleness.*" When an officer is wounded and sent to hospital, can it be said that he does not serve so long as he continues to suffer from that wound? Has the pay of officers absent on sick leave or in hospital ever been

reduced because they were not actually performing military duty? On page 6 of their "brief" my learned friends on the other side advance the theory that inasmuch as sec. 1262 R. S. does not *specifically* include *retired* officers, its provisions cannot apply to them, which is hardly complimentary to the intelligence of the court, inasmuch as the grant referred to includes in terms *each* and *every* commissioned officer below the rank of brigadier-general without specifically designating either those *retired* or those on the *active list*. Again, on page 9, they tell the court that a retired officer is incapable in fact or by law of performing or being called upon to perform any military duty.

Sec. 1259 Revised Statutes is in words as follows:

"Retired officers of the army may be assigned to duty at the Soldiers' Home, upon a selection by the commissioners of that institution, approved by the Secretary of War."

And sec. 1 of the act of May 4, 1880, making appropriations for the support of the army, &c., contains a proviso in words, as follows:

"That upon the application of any college, university, or institution of learning, incorporated under the laws of any State within the United States, having capacity at the same time to educate 150 male students, the President may detail an officer of the army on the retired list to act as president, superintendent, or professor thereof."

Now, will any one pretend that either of these laws does not confer *absolute authority* for the assignment of retired officers to duty? Again, the Government provides stationery for retired officers, which is issued to them by the Quartermaster's Department. And why? simply because they have official duties to perform. Will any one pretend that the particular *nature or extent* of those duties is material for the purposes of this argument? Again, Congress can at any time impose *special* duties upon retired officers which they

would be forced to perform, which could not be the case if they were *not* in service.

And sec. 1782 R. S. forbids that any officer or clerk in the *employ* of the Government shall receive or agree to receive, directly or indirectly, any compensation for services in the prosecution of any claim before any of the Executive Departments of the Government, on pain of a heavy fine and imprisonment. And this law has ever been held to apply with full force to officers on the retired list. Because, in that connection, retired officers have been and are held to be in the *employ* of the Government.

And again, it was urged in the court below "that service, when used without the article, can have no other signification than actual duty, or the pretension and obligation to actually perform certain prescribed duties, active service." Also: "When the statutes use the word *service* as synonymous with army, or in commission it ever employs the expression *the service;*" hence, the phrase *retired from service* would mean what is phrased in the Revised Statutes (sec. 1251) "*retired from active service*," in which case the word *active* s superfluous. Also, the phrase *retired from the service* would mean what is phrased (R. S., sec. 1252,) "*wholly retired from the service;*" in which case the word *wholly* would be superfluous; or, in other words, the use or omission of the article "the" would be sufficient to determine whether the officer is retired from *active* service or *wholly* retired from the service; and this line of argument has been adopted by my learned friends on the other side. (Pages 12 and 13 of their brief.)

R. S., sec 1245: "Retired from active service, or wholly retired from the service." Sec. 1251: "Retired from active service and placed on the list of retired officers." Sec. 1252: "Officers wholly retired from the service shall be omitted from the Army Register."

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See, also, sections 1253, 1254, 1255, 1256, and 1257. Now, I respectfully submit that the mere fact than an officer is not wholly retired from service is *prima facie evidence that he is still in service.*

"The" is a definite article, but the word *service* to which it is applied has a very indefinite signification; and yet upon the mere use or omission of the article in connection with a word so manifestly indefinite this Honorable Court is asked to determine a great principle of justice.

It must be a desperate case, indeed a forlorn hope, that drives an adversary to straits like this! It is not the policy of our Government to resort to such small and ingenious devices to pervert a plain provision of law to the hurt of any of its citizens, much less those who have, by their valor and the letting of their blood, saved that Government from dissolution.

The retired list was established in 1861. Prior to that time officers permanently incapacitated for active service were relieved from active duty, but continued to be borne on the rolls of their respective arms of the service, as on waiting orders or on sick leave, with full pay, and since the retired list has constituted a part of the regular military establishment, it has been a very common thing for officers to be absent on sick leave (often in Europe) for months, and frequently for years at a time with fuil pay; and, again, at times when the retired list was full, to the limit, officers have been ordered before retiring boards, and upon being found permanently incapacitated for active service, have been relieved from duty and held for months, and I believe in some cases for years, as on sick leave; and while this is a fact, it is also true that, in computing length of service for longevity pay, none of these officers have ever been denied the right to include all time in commission, *excepting only time on the retired list since July 1st*, 1870. Now if, as has

been urged by my learned adversaries, (page 12 of their "brief,") service means *actual duty performed*, *active service*, then I respectfully submit that all time passed in hospital, on sick leave, or on the retired list *prior to July 1st*, 1870, must be excluded from such computations, and the officers, if living—or if dead, their legal representatives—must be required to refund all longevity pay received by them on account of such excluded time; and yet no one imagines that any retired officers have received more longevity pay than the law contemplates; no one proposes to go to the daily, weekly, and monthly reports to ascertain the exact number of days each officer has actually been employed, with a view of revising his account with respect to longevity pay, and yet if service necessarily signifies duty, *actual* employment, not only would such revision be necessary, but a daily time-table would have to be kept for each and every officer in the army, in which case the usual "present for duty" would not count for longevity unless the officer was *actually employed*, in harness. Now, it must be apparent that retired officers have been no less in service since July 1st, 1870, than they were prior to that time. No less is required of them when off duty than is required of officers of the active list, on sick leave. Both are required, by an imperative order, to report their address to the Adjutant-General monthly, and are forbid to cross the sea without the permission of the War Department, both are under the surveillance of the Government, and required to support the character of gentlemen, on pain of trial by court-martial and dismissal from service; and, in short, it may be fairly stated that retired officers are virtually on sick leave, with the restricted pay which follows retirement.

In support of the foregoing I respectfully submit the following from the decision of the court below in this cause:

"The defendants contend that officers on the retired list are

not entitled to the longevity pay allowed by section 1262 of the Revised Statutes, except for the periods of five years in which they were in the active service; that when they are placed on the retired list they cease to be in service, and so the periods therein specified cease to run.

"We deem this to be an entire departure from the true meaning of the section.

"The statute gives to each commissioned officer below the rank of brigadier general additional pay for each term of five years' service; that is, service as a commissioned officer in the regular army.

* * * * * *

"The construction which the defendants urge would place retired officers wholly out of the service. That is certainly not the intention of the law, either expressed or implied. Section 1245 of the Revised Statutes makes a distinction between officers retired from active service only and officers wholly retired, which implies that the former remain in service, though not in active service, while the latter are out of the army altogether. This is the provision:

"'When any officer has become incapable of performing the duties of his office, he shall be either retired from active service or wholly retired from the service by the President, as hereinafter provided.'

"The same distinction is made in sections 1252, 1275. So wherever in the statutes active service is meant, the word 'active' is invariably inserted to qualify 'service.' (Rev. Stat., sections 1243–1245, 1249, 1251–1257, 1274.)

"In the section now under consideration the word 'active' is not used, and the word 'service' is left unqualified, to receive its usual and natural interpretation.

"Officers of the retired list still remain in the service. They hold commissions as officers of the army, and by section 1094 of the Revised Statutes they are expressly designated as among those of whom the army of the United States shall consist. It is true that they are generally exempt from active service. But they may be assigned to duty at the Soldiers' Home, (Rev. Stat., 1259,) and they are specially subject to many provisions of law, which are imposed upon them for the very reason that they are in service as officers of the army. By Revised Statutes, section 1256, they are entitled to wear the uniform of the rank on which they are retired; their names are continued on the Army Register, and they are made 'subject to the rules and articles of war, and to trial by general court-martial for any breach thereof.'

"The sixty-first article of war provides that 'any officer who is convicted of misconduct unbecoming an officer or a gentleman shall be dismissed from the service.' There is no doubt that officers may be dismissed from the retired list under this article, and in point of fact retired officers have been so dismissed. That could not be the case unless they are held to be in the service.

"By section 1223 of the Revised Statutes retired officers, like all other officers of the army, are prohibited from holding any appointment in the diplomatic or consular service of the Government, on the pain of being held to have resigned their places in the army.

"Besides, being officers in the army, Congress can at any time impose upon them special duties, which they would be forced to perform.

"These citations and illustrations are sufficient to show that officers do not cease to be in service by the mere fact of being placed on the retired list and relieved from active duties.

"The language of section 1262 of the Revised Statutes, allowing longevity pay to each commissioned officer below the rank of brigadier-general, is broad enough to include the claimant, and to confer upon him the full benefit of its provisions, since he is a commissioned officer below the rank of brigadier-general. There is no exception of retired officers either in that section or in section 7 of the act of 1878, June 18, ch. 263, which extends its benefits so as to include service as officers in the volunteer forces during the war of the rebellion, or as enlisted men in the armies of the United States."

PAY OF RANK OR GRADE OF RETIRED OFFICERS ESTABLISHED BY LAW AND NOT A BONUS.

For the purpose of this part of my argument I beg the court to bear in mind that the statutes employ the words "*rank*" and "*grade*" indifferently to convey the same meaning. Hence, when used in relation to an army officer's pay they are synonymous. (See Revised Statutes, sec. 1205.) "A *grade* in his regiment 'equal to the *grade*' of his commission." Sec. 1206: "Below the *rank* of field officer; * * promoted to a higher *grade*." Sec. 1207: "Promoted to the *rank* of captain; * * officers of the same *grade*." Sec. 1208: "*Rank* of field officer; * * pro-

moted to higher *grade*." Sec. 1211: "Brevet *rank*." Sec. 1212: "Actual *rank*." Sec. 1217: "Appointments to fill the *grades*." Sec. 1226: "Highest volunteer *rank*; * * uniform of highest *grade*." Sec. 1256: "Uniform of *rank*." Sec. 1262: "Below the *rank* of brigadier-general; assimilated *rank*." Sec. 1263: "Yearly pay of *grade*." Sec. 1270: "Officer of same *grade*." Sec. 1274; "Pay of the rank." Sec. 1275: "Pay of highest rank." Sec. 1310: "Rank of colonel," &c., &c.

Now it must be conceded that "*rank*" and "*grade*," when used in relation to army officers, are *synonymous terms*. It will be remembered that the act of July 15th, 1870, providing for the percentage increase on the "*current yearly pay*" limits such increase for length of service to "40 per centum of the yearly *pay of his grade as established by this act;*" and this provision of law is re-enacted in sec. 1263 R. S., the phrase being changed so as to read: "Forty per centum of the yearly pay of his grade, *as provided by law*." It becomes important, then, to ascertain what the *pay* of a retired officer's grade *is*, as "*established*" or "*provided by law*." Now, I respectfully submit that the pay of a retired officer's *grade* or *rank* was definitely and conclusively established by the act of July 15th, 1870, now sec. 1274 R. S., which is in words as follows: "Officers retired from active service shall receive seventy-five per centum of the pay of the rank upon which they are retired." Now, will any one contend that this statute does not, in conjunction with the statute fixing the pay of officers on the active list, *definitely* and conclusively establish the pay of the *grade* or *rank* of officers on the retired list? *Is not seventy-five per cent. of a dollar* as definite a sum as the whole?

My learned adversaries not only admit all of this, but *claim it* for the purposes of *their* argument in their opening paragraph on page 5 of their "brief," which is in words as

follows: "Sec. 1274 Rev. Stat. was intended to determine the entire amount which officers of the class to which it relates can receive. This it does by reference to a definite and unvarying standard, to wit, "*the pay of the rank upon which they are retired.*" They also, in the next paragraph, claim, as *we* claim, that the *pay for length of service* is an allowance of pay *separate* and *distinct* from the *pay of the rank*. We presume their object is to show that an officer on the *retired list* is not entitled to any longevity pay whatever, or, in other words, because the pay of his rank *is fixed*, he must [*unlike the officers of the active list*] be denied his pay for length of service, whether the service accrued prior to or after retirement, in which event all that has been paid to retired officers *for length of service* since July 1st, 1870, would have to be refunded to the Government, while our object for claiming and insisting that the pay of the *rank* of *retired officers is definitely established*, and that it is *separate* and *distinct* from the pay *for length of service*, is to show that sec. 1274 R. S. does not in the remotest sense relate to "*longevity pay*," and to *require* the adoption of the correct method of computing the percentage increase *for length of service.*

The pay fixed for the officers of the active list *must have been the pay of retired officers*, but for the intervention of that clause of the statute embraced in sec. 1274, as I shall more fully show hereafter. My friends on the other side must therefore have been wandering when they suggested, (p. 6 of their "brief") that sec. 1274 should be "held to be the only authority for compensating officers retired from active service."

Ordinarily I should not argue a point already conceded, but since my friends on the other side concede retired officers to be in the service, and afterwards argue that they are *not* in service, I am constrained to rely more upon the force of

argument than their admissions. Begging pardon for continuing upon the points now under discussion, I respectfully submit that, if the mere fixing of the salary proper precludes *any* and *all* other allowances of additional *pay*, why not be consistent and apply the rule to officers on the *active* list? And to that end the Department might issue another circular, to the effect that in all cases where the law fixes the salaries of officers, all other laws or parts of laws granting additional pay for *length of service*, *special duty*, or *additional responsibility*, are held by this office to be inoperative, because the *salary proper* has been fixed by some other clause of the statute. Now we insist that the pay of a retired officer's *rank* is the *basis* upon which his percentage increase for length of service *must* be computed.

It was urged in the court below, with respect to the statute now under consideration, that "it being last and separated from other officers and their longevity allowance, the legislature was taking up a new subject, concerning which it had not before made any provision, and that it cannot, therefore, relate back." Now, if this theory is correct, it would follow that if the clause of this statute relating to retired officers' pay had been omitted, their pay would have stopped. Whereas, your Honors know full well that, but for the intervention of this clause, retired officers *must* have received full pay, as the statutes make no other distinction between the pay of retired officers and that of officers on the active list, and it must necessarily relate back, because the salary of the retired officer is a percentage based upon the full pay of his rank; therefore I insist that this clause (now sec. 1274 R. S.) merely restricts the salary proper of a retired officer to 75% of the pay of the rank upon which he is retired. Again, it has been urged that a retired officer's pay is a bonus or pension, and if this were true it would necessarily follow that their *pension*, for such it would be,

would have no relation whatever to the pay of officers on the active list, and would in no wise be affected by any change in the pay of the active list. Whereas, your Honors are well aware that if the pay of the active list were to be reduced the pay of the officers on the retired list would thereby be reduced correspondingly; therefore their pay is no more in the nature of a *bonus* than is the pay of the active list, and the question of sequence of statutory provision falls to the ground.

This portion of my argument is sustained by the decision of the court below, as follows:

"Notwithstanding the claimant has been in the army continuously since December 26, 1861, a period of more than fifteen and less than twenty years, embracing three terms of five years' service each, the defendants contend that he is entitled to seventy-five per cent of the pay of the rank of captain, unmounted, upon which he is retired, allowed by law to an officer of that rank who has served one, and only one, period of five years.

"This they do on two grounds: First, that the closing words of section 1274 of the Revised Statutes, viz., 'upon which they are retired,' qualify the previous word 'pay' so as to limit the annual pay of a retired officer for the rest of his life to that sum which he first became entitled to at the very point of time when he was retired.

"We are unable to concur in such a construction. It is in conflict with the obvious and grammatical connection of the language of the section, and is not in accord with the manifest purpose for which the words 'upon which they are retired' were added. Those words plainly qualify the word 'rank,' immediately preceding them, and thus specifically define the rank, and nothing more, which shall control, for the time being, the pay of retired officers.

"Thus there is nothing in section 1274 of the Revised Statutes to preclude the claimant from having his pay computed precisely as is that of an officer of his rank on the active list, subject only to the reduction of one-fourth part, as there provided."

CURRENT YEARLY PAY.

The statute provides that the percentage increase for *length*

of service shall be computed upon the *current yearly pay*, provided that the total amount of such increase shall in no case exceed forty per centum of the yearly pay of his grade *as provided by law*. Now, it must be obvious to your Honors that "*current yearly pay*" embraces not only the pay of the rank, but *all other allowances of yearly pay*, and that this rule applies to officers of the active list as well as retired officers, until, by the accruments maturing at the end of each term of five years, the maximum of forty per centum on the pay of the *grade* is reached, after which the computation *must* be made upon the yearly pay of the grade *as established by law*. It will be observed that the statute, after fixing the *full* pay of all the different grades, provides certain allowances of *yearly pay* for *aides de camp* and acting assistant commissaries, in addition to the pay of their rank or grade, and then provides for the percentage increase upon the "*current yearly pay*," with the proviso limiting such increase to forty per cent. on the *yearly pay of the grade*. Now, the use of the phrase *current yearly pay* and the use of the phrase *yearly pay of his grade* immediately thereafter in relation to the same subject-matter shows conclusively that the legislature intended the exact distinction which the language imports. Here is the *yearly* pay of the rank provided for, and then additional *yearly* pay is provided for certain officers; and it is quite clear that the phrase, "*current yearly pay*," was used in order that the percentage increase might be computed on both salary proper and the additional allowance of yearly pay. The rule, therefore, laid down in par. 5 of circular 73, before cited, is erroneous, for it must be admitted that the *current yearly pay* embraces not only the pay of the rank or grade, but *all* other allowances of yearly pay. The court below, whilst granting all that I claim for officers of my rank, has laid down a rule which, if adhered to, results in hardships to *retired colonels and lieut.-colonels*

in consequence of the limit imposed by the statutes upon the pay of officers of *their rank on the active list;* and while I entertain the highest respect for the opinions of that court, I can but regard that rule as erroneous. It is in words as follows: "*The pay of a retired officer is to be determined by first ascertaining what would have been his pay had he not been retired, and then allowing him seventy-five per centum of that sum.*"

After laying down this rule the opinion continues as follows:

"There remains one other question which, although of less importance than those which we have been considering, has been raised, and we must therefore pass upon it. It relates to the manner of computing the ten per cent. longevity pay, and the meaning of the words 'current yearly pay' in section 1262 of the Revised Statutes. The defendants insist that the current yearly pay is the fixed annual pay, without the addition for longevity. Thus the pay of a captain, not mounted, is by section 1261 of the Revised Statutes eighteen hundred dollars a year. For each term of five years' service the defendants would add ten per cent. of that sum only—$180.

"That is a convenient method of calculation, since it avoids fractions of dollars, and may have been adopted by the pay officers for that reason, as it does not largely vary the result in any case. But it is not strictly accurate. 'Current yearly pay' implies a pay which is subject to change as the years run on. The expression is nowhere found in the statutes except in this connection. *It evidently means ten per cent. of the whole pay the officer is receiving, or is entitled to receive, at the time he becomes entitled to an increase of pay.* Thus for the first five years of service a captain, unmounted, receives $1,800; for the second five years, $1,980; for the third five years, $2,178; for the fourth five years, $2,395.80; and for the fifth five years it would be $2,635.38 but for section 1263, which limits the total amount of such increase not to exceed forty per centum of the 'yearly pay' of the grade as provided by law, which would reduce the latter sum to $2,520.

"It is significant of the intention of Congress that in section 1263 the limitation of the total amount of increase for length of service is a percentage of forty per cent., not upon the 'current yearly pay,' upon which, by the next preceding section,

the periodical increase is to be computed, but is upon the 'yearly pay of the grade,' thus making a distinction between 'current yearly pay' and the unchanging 'yearly pay of the grade,' which we but adopt, follow, and apply with mathematical precision.

"Retired captains, unmounted, are entitled to three-fourths of those sums respectively, according to the length of their services.

"It follows that the claimant should have received—

"After ten years' service as commissioned officer, computed from May 25, 1874, to June 18, 1878, 4 years and 24 days, at the rate of $1,633.50 a year.	$6,642	90
"After 15 years' service, computed from December 26, 1861, under the act of 1878, June 18, ch. 263, § 7, allowing his term of service as an enlisted man to be included, from the date of the passage of that act to May 15, 1880, when this action was brought, 1 year 10 months and 27 days, at the rate of $1,796.85 a year.....	3,428	99
	$10,071	89
"Having been allowed only	8,868	75
"He is entitled to judgment for the balance.....	$1,203	14

"Judgment will be entered in favor of the sum of $1,203.14."

Now, your Honors will observe that with the single exception noted, the court below has concurred in our argument and sustained us on *every point* in controversy; and if it shall appear that the Court of Claims was in error on that point, then we respectfully ask that such error be corrected. The rule to which we except requires "that the pay of a retired officer shall be determined *by first ascertaining what would have been his pay had he not been retired, and then* allowing him seventy-five per cent. of that sum." Now this claimant, and a number of other officers have been retired on higher rank than they held on the *active* list, and retired officers being withdrawn from the line of promotion, and for various other reasons, it would be impossible to determine definitely what *would have been* the pay of a retired officer had he not

been retired. Again, if we *could* ascertain what would have been his pay had he not been retired in order to carry out this rule, it would be necessary to compute the percentage increase on his *full active service pay*, while, under the statute, it must be computed upon his *current yearly pay*, or upon the pay of his grade *as established by law*. It must, however, be obvious to your Honors that the current yearly pay of a retired officer is *all* the pay he is entitled to receive for the time being, and it will be observed that the decision of the court below sustains this theory in the teeth of its own previously uttered rule, in words as follows: "*Current yearly pay* implies a pay which is subject to change as the years run on. The expression is nowhere found in the statutes except in this connection. It evidently means ten per cent. of the whole pay the officer is receiving or is entitled to receive at the time he becomes entitled to an increase of pay." This is the natural interpretation, and it is unquestionably correct; and it may be said with equal confidence that an officer's active service or full pay is in no sense either the current yearly pay of a retired officer or the yearly pay of his grade as established by law.

On page 286 of the official Army Register for 1881 may be found the officers' pay-table, which states definitely the *yearly* and *monthly* pay of officers, both *active* and *retired*. $1,800 is there named as the pay of the grade of a captain on the *active list*, *not mounted*, and $1,350 is named as the pay of his grade *if retired;* and I respectfully submit, and insist, that the *true and lawful* method of computing the percentage increase on a *retired* officer's pay is illustrated as follows: *Captain, not mounted:* Pay of *rank*, as provided or established by law, $1,350, which is current yearly pay during the first 5-year term, there being no other yearly pay during that time. For this 5 years' service, 10 per cent. ($135) is added, thus increasing the pay to $1,485, which

is the current yearly pay until the expiration of the second 5-year term, when another 10 per cent. ($148.50) is added, increasing the pay to $1,633.50, which becomes the current yearly pay until the maturity of the third accrument, at which time a third 10 per cent. ($163.35) is added, thereby increasing the pay to $1,796.85, which is the current yearly pay until the end of the fourth term of 5 years, when the restricting clause (R. S., sec. 1263) intervenes, and, in accordance therewith, the longevity pay is computed at 40 per cent. of the pay of the *grade*, to wit: 40 per cent. of $1,350, and the maximum is thereby reached at $1,890, which from that time on remains the current yearly pay. Therefore the yearly pay of a captain on the retired list, not mounted, correctly computed, is as follows:

Prior to 5 years' service, $1,350; after 5 years, $1,485; after 10 years, $1,633.50; after 15 years, $1,796.85; and after 20 years, $1,890; and I respectfully submit that the following computations show the true amount of my claim, to wit:

I should have received, after 10 years' service, from May 25th, 1874, to June 18th, 1878—4 years and 24 days—at the rate of $1,633.50 per year	$6,642 90
And after 15 years' service, from June 18th, 1878, to May 15th, 1880—1 year 10 months and 27 days—at the rate of $1,796.85 per year	3,428 99
Total	$10,071 89
Whereas I did receive from May 25th, 1874, to May 15th, 1880—5 years 11 months and 20 days—only at the rate of $1,485 per year	8,868 75
The true amount of my claim is	$1,203 14

When an accrument of longevity pay is earned, *it is the*

property of the officer, and his pay is permanently increased by that amount the same as the pay of the enlisted man is increased by adding one or more dollars per month for additional years or additional enlistments. (R. S., secs. 1281, 1284.)

Each increase fixes a new basis of pay.

In conclusion, as regards the law, I respectfully submit that the foregoing is the most natural interpretation, and in support of this, if this Honorable Court will indulge me, I will state that I have consulted more than one hundred officers, many of whom are in no wise concerned in the result of this suit, and out of that large number of men of such high order of intelligence, many of whom have commanded brigades, divisions, and even corps in battle, not one has dissented from my views with respect to the question of legal rights here involved.

Touching this question of interpretation my learned friends on the other side (page 5 of their "brief,") practically admit the correctness of our position to wit: "It seems admissible to extend the examination beyond a possible literal signification of the statute, and if the language will not be distorted thereby, to conform the statute to the object to which it appears naturally applicable." They then go into quite an extensive examination of authorities with a view of changing the "literal signification," (on grounds of public policy) "without distorting the language," and it seems to me they have utterly failed to find consolation except upon the *erroneous assumption* that retired officers are *totally* and *permanently*, *physically*, and *legally* disqualified for ever rendering a future service, or, to be more literal, that they "can by no possibility render a future service." (Pp. 5 and 11 of their "brief.") Immediately preceding this remarkable proposition to change the "literal signification of the statute," the court is reminded of the extensiveness of the

claims involved in this cause, and the dire consequences which *may* result to the Treasury, in words as follows: "So extensive is it, that if the construction hitherto practised by the Department was erroneous, there is not an officer of five years' service in the army, navy, or marine corps, or a professor at the two academies who has not been adversely affected thereby, and who cannot obtain a judgment accordingly as has this claimant."

Would my learned adversaries wish to influence the judgment of this Honorable Court by a reference to the extensiveness of the claim? For the honor of the Government I could wish that they would not, however they have greatly exaggerated the magnitude of the claims involved in this cause. As a matter of fact, with respect to officers of the army and Marine Corps on the *active* list, no claim can arise except for service after ten and prior to twenty years, and the claims so arising would range from $14 per annum as a minimum for a 2d lieutenant to $42.35 per annum as a maximum for a colonel; and with respect to officers of the navy, *none* on the active list and only about *sixty* on the retired list would have claims. I trust that this information will relieve my learned adversaries of their apparent apprehensions with respect to the Treasury; and right here I beg to assure this Honorable Court, in all candor, that I desire no decision at its hands other than that to which I am justly entitled under a *fair* interpretation of the laws.

My counsel and colleague, Judge Warden, will notice more particularly the legal citations which I have hereinbefore referred to in a general way.

Finally, with respect to the questions of law and fact, we confidently claim that we have shown conclusively, first, *that retired officers of the army* ARE IN SERVICE *and entitled to be so regarded with respect to longevity pay; second, that the pay of the rank or grade of retired officers is definitely*

established by law, and, as so established, constitutes the BASIS *upon which their percentage increase for length of service* MUST BE COMPUTED; third, that the *current yearly pay* of *all* officers, either *active* or *retired*, is the *aggregate amount* of *yearly* pay which they are, or may have been, entitled to receive for the time being.

And I desire now to show how completely the law, as I interpret it, accords with justice and equity. All commissioned officers of the army receive the maximum of increase for length of service after twenty years' service. The pay for length of service is limited to forty per cent. of the yearly pay of *the grade*, as provided by law, and the number of retired officers is limited to four hundred. Of this number, about 200 are now receiving the maximum of longevity pay, and the rest are receiving from one-quarter to three-quarters of the maximum amount allowed for length of service. Now, those who are receiving less than the maximum have almost invariably been prematurely retired on account of wounds received in battle, while those who are receiving the maximum are retired mostly for age, length of service, or disease.

To illustrate this fact, I will take the case of the retired colonels, of whom, on the 18th of March, 1880, there were 57; of this number 45 were receiving the maximum of longevity pay, and 12 were receiving less than the maximum; and of the 45 named *only four were retired for wounds, while the* 12, *who were receiving less than the maximum, were all retired for wounds, and of this* 12 *nearly all have lost a leg or an arm;* and this showing obtains to a very great degree through the whole retired list. Let it not be forgotten that officers of the army are, by the nature of their profession, unfitted for the ordinary vocations of life, and their retired pay is their main dependence for a support for themselves and their families in their old age.

The longevity pay is not provided because the service of the officer is more valuable after fifteen or twenty years than it is after five or ten years; but to enable him to meet his necessities and live respectably at a time of life when his expenses are very justly expected to be greater than they were in earlier life, and as a reward for his sacrifices, or for long and faithful service.

Will any one contend that the officer who early in his military career becomes disabled in the service of the country by wounds or disease shall not claim as much for longevity as his brethren who escape harm, and continue to enjoy their physical powers, wholesome service, full pay, and promotion? The retired officers do not expect an equivalent for the loss of limb or health, nor do they ask to be continued in the line of promotion; but the accruing longevity pay which was intended to meet the growing necessity of their advancing years should not be denied them after they have become disabled in the performance of their duties as soldiers. Retirement does not arrest the increasing necessities of the officer, nor release him from his obligation to maintain the respectability and dignity of a gentleman.

The ethics of the military profession have frequently been discussed with more freedom than intelligence. My learned adversaries urge that longevity recognizes that experience is more valuable than inexperience, and is accordingly an inducement to competent and skilful officers to remain and not to retire or resign. Now, I need not remind this Honorable Court that it is not within the power of any officer to take himself out of the army by resignation. The Government reserves the right to accept his resignation or retain his services; and as regards retirement, no amount of longevity pay can stop it, any more than it can stop the cannon ball or gun-shot which in so many cases has made retirement necessary. To the officer permanently incapacitated for ac-

tive service retirement is compulsory, and not a few officers have been arbitrarily retired upon the very eve of acquiring an additional accrument of longevity pay or a promotion. Longevity pay, therefore, is unnecessary to prevent retirements or resignations. A retired list was found necessary, in order that officers permanently incapacitated for active service might be removed from the line of promotion, so that the junior officers and officers of lower grades, who had the more responsible duties to perform, could have the rank and pay commensurate with those duties. Besides, without promotion, any army will very soon become paralyzed.

Both the retired list and the pension roll exerted their wholesome influence during the late war in maintaining that *esprit de corps*, so essentially necessary to the dicipline and efficiency of an army.

In the writings of George Washington, by Jared Sparks, may be found the following:

"HEIGHTS OF HAERLEM,
24 *September*, 1776.

"SIR: From the hours allotted to sleep, I will borrow a few moments to convey thoughts on sundry important matters to Congress. I shall offer them with the sincerity which ought to characterize a man of candor, and with the freedom which may be used in giving useful information, without incurring the imputation of presumption. We are now, as it were, upon the eve of another dissolution of our army. * * * It is vain to expect that any more than a trifling part of this army will again engage in the service on the encouragement offered by Congress. * * * A soldier reasoned with upon the goodness of the cause he is engaged in, and the inestimable rights he is contending for, hears you with patience, and acknowledges the truth of your observations, but adds that it is of no more importance to him than to others. The officer makes you the same reply, with the further remark, that his pay will not support him, and he cannot ruin himself and family to serve his country, when every member of the community is equally interested and benefited by his labors. * * * It becomes evident to me, then, that as this contest is not likely to be the work of a day, as the war must be carried on systematically, and to do it you must have good officers, there are no other

possible means to obtain them but by establishing your army on a permanent footing, and giving your officers good pay. This will induce gentlemen and men of character to engage, and till the bulk of your officers is composed of such persons as are actuated by principles of honor and a spirit of enterprise, you have little to expect from them. They ought to have such allowance as will enable them to live like and support the character of gentlemen, and not be driven by a scanty pittance to the low and dirty arts, which many of them practice, to filch from the public more than the difference of pay would amount to upon an ample allowance. Besides, something is due to the man who puts his life in your hands, hazards his health and forsakes the sweets of domestic enjoyment. * * * There is nothing that gives a man consequence and renders him fit for command, like a support that renders him independent of everybody but the State he serves. * * * I am yours and the Congress' most obedient servant, &c.,

"GEORGE WASHINGTON.

"*To the President of Congress.*"

Comments upon these utterances of General Washington are unnecessary for the purposes of this argument. When war is waged and the wealth, if not the very life of the Government, is in danger, then is the time when the past generosities of that Government to the men, who, by their valor, have before saved it, exert their wholesome influence, inspiring in the hearts of the people that love of country, without which it would be impossible to raise and organize an efficient army for war.

Again, it has been urged that longevity pay was intended as a reward for long and faithful *active* service *only;* and if this is true, it might with propriety be regarded as a premium for cowardice and the avoidance of all hazards likely to result in premature retirements, which, to say the least, would be prejudicial to the efficiency of an army. As an indication of the views of Congress on this subject, the joint committee of the two Houses in their report, 3d session, 45th Congress, recommended that the maximum pay for officers retired on account of *age or length of service* should

be 80 *per cent.* of their full pay, but that officers retired for wounds or other *incapacity incident to service* should receive *full pay*, if the disability be rated as total. This is the expression of a joint committee of Congress appointed with authority to sit during the recess and make a thorough investigation into the matter of army reorganization and the demands of the public service, and the report (a volume of 512 pages) shows for itself that it is the result of very great research and deliberation.

As touching upon the same subject, I respectfully submit the following:

BY GENERAL GRANT.

"I most cordially endorse the advancement of those lieutenants of the army who have lost a limb in the service of the country and have been retired. Shut out from promotion as they are by their retirement, and disabled for life in the service of their country, I would like to see them advanced a grade for each ten years during their lives.

"U. S. GRANT.

"NEW YORK CITY, *December 29th*, 1880."

The above endorsement was made upon a petition to be used before Congress, and it is suggestive, to say the least. General Grant evidently appreciates the hardships resulting from retirement, chief among which are the reduction of pay, loss of promotion, and want of occupation. The present retired list is largely the result of a great war; the officers composing it are growing old; many of them are in the sere and yellow leaf, or wasting from open wounds received in battle, and, at most, will sign but a few more pay accounts; and only a few more years must roll around until the last of those who participated in that war will have passed away. Nothing short of another armed conflict of equal magnitude can restore the retired list to its present proportions. This retired list is conspicuously a roll of honor, representing in a broad sense the genius, patriotism, and

valor which saved the life of the Government, and it should not be forgotten that while, under the immutable laws of nature, this honored roll is so rapidly diminishing in numbers, that Government is as rapidly growing in power, wealth, and grandeur. Is the price too great for such an inheritance? And must it be scaled down by an unnatural interpretation of the laws, to the hurt of the most honored of those who have so preserved it? Begging the indulgence of the Court, there is one other matter which I desire to notice before closing. It has been urged that "*retirement pay is a pure gratuity*," or, in other words, a charity. Now, if such utterances are worthy of any consideration whatever, they can but be regarded as an insult, not only to every retired officer of the army and navy and those who are borne on the pension rolls, but to the honorable judges of the United States courts who have retired with full pay, under section 714, Revised Statutes.

Much might be said upon this subject of Government charity, so called, but as the members of this Honorable Court had reached the years of understanding before the late war, and have not forgotten what were known as the dark days of the rebellion, when the very existence of the Government hung trembling in the balance, all depending upon the efficiency, patriotism, and valor of our army, it need not be reminded of the far-reaching value of the services of the men who, at that critical time, stood in the breach. No patriotic citizen who experienced the extreme rigor of public anxiety during that critical period, and is capable of comprehending the blessings of a free government, will ever regard the pay of these retired officers or the pay of this pension roll as a gratuity.

RICHARD W. TYLER,
Captain U. S. Army, (Retired.)